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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 436

LEO J. SCHLINSKY,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR PETITIONER IN REPLY

DAVID M. SCHEFFER
Counsel for Petitioner
80 Federal Street
Boston, Massachusetts 02110

BENJAMIN ARAC
JEROME GOTKIN
STEPHEN M. HONIG
Of Counsel

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The Government concedes that one error found in *Lenske* v. *United States*, 18 AFTR 2d 5815 (C.A. 9), was the Government's "clever scheme" of recording only the grand jury testimony of those witnesses who were not Government agents, and of making no record of the agents' grand jury testimony.[1] But the Government attempts to avoid

[1] This is a situation which, to our knowledge, has not previously been presented to this Court, since such earlier cases as there have been involved situations in which no grand jury testimony at all was recorded.

the impact of *Lenske,* and the conflict between it and the First Circuit's decision below, by claiming that there is "a material difference between the facts here and what the Ninth Circuit found to be the case in *Lenske*" (Gov. Mem. 7).[2]

The Government's claim that there is "a material difference" of fact between this case and *Lenske* is wholly without merit and is based on an out-of-context quotation from *Lenske* and on a contorted reading of the record herein.

The Government states that in *Lenske* the Ninth Circuit concluded that " 'the Government so arranged matters that ... there would be no writing which the taxpayer might use for cross-examination' ", and then argues that this case is different because here petitioner did have "writings" available for cross-examination, namely, a referral report and certain other records of Revenue Agent Murphy (the key Government witness whose grand jury testimony was not recorded) (Gov. Mem. 7). The missing "writing" to which the Ninth Circuit was referring in *Lenske,* however, was not any of the Special Agent's reports or records, but his grand jury testimony. The full statement of the Ninth Circuit, from which the Government took the portion quoted in its memorandum, speaks for itself (67-2 USTC ¶9631, at 85,105):

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[2] The Government also suggests that this Court deny the petition herein because "the Ninth Circuit has yet to act on a petition for rehearing *en banc* that the government filed" (Gov. Mem. 7, n. 3). That motion was denied on August 28, 1967, and on the same day, the Ninth Circuit withdrew its earlier opinion (reported at 18 AFTR 2d 5815) and rendered a new opinion (reported at 67-2 USTC ¶9631). The new opinion, while stating that it was not necessary to decide whether the Government's "clever scheme" would alone have constituted ground for reversal, restated word for word its earlier finding that the Government had acted unfairly and that the incident was "particularly offensive" (compare 18 AFTR 2d at 5822 and 67-2 USTC ¶9631 at 85,104 - 85,105).

> Whether government counsel meant that no shorthand notes had been made of the Special Agent's Grand Jury testimony, or that such notes were taken and had not been typed up, it is evident that the Government so arranged matters that there would be available transcripts by which neutral witnesses could be held to their Grand Jury testimony and checked if they varied from it, while as to government partisan witnesses, who presented no danger of their being swayed from their recitals, there would be no writing which the taxpayer might use for cross-examination. It was a clever scheme, but one-sided and unfair, and in complete violation of the teachings of *Holland* v. *United States, supra.*

Furthermore, the defendant in *Lenske* had many other "writings" of the Special Agent available to him for cross-examination. He not only had "all memoranda and statements made by the Special Agent," but also (except for certain deletions made by the trial court) the Special Agent's report which consisted of 37 closely typewritten pages, followed by an appendix of 84 pages which listed 468 exhibits, and the names and addresses of 315 prospective witnesses (67-2 USTC ¶9631, at 85,107 - 85,108; this report is also referred to in the Ninth Circuit's earlier opinion, 18 AFTR 2d, at 5815-5816).

It is beyond cavil that the "writing" which was unfairly denied the defendant for cross-examination in *Lenske*—as in this case—was the agent's grand jury testimony.

Lastly, the Government assigns a reason for its failure to record Murphy's grand jury testimony which is not only unsupported, but contradicted, by the record. The Government states (Gov. Mem. 7):

> Here the reason for not recording grand jury testimony was that Murphy submitted such detailed reports and work papers that recordation was unnecessary.

In contrast, the record (which consists of a letter from the United States Attorney, District of Massachusetts, to the First Circuit (Appendix C to petitioner's petition)) states:

> In Footnote 2, page 11, of Appellee's Brief, as well as in oral argument, counsel for the Government stated that it has been a long established policy of the United States Attorney, District of Massachusetts, not to record the Grand Jury testimony of "Government employees."
>
> We believe, upon reflection, that the phrase "Government employees" is a bit too inclusive and apt, therefore, to mislead the Court. The policy, in fact, has been not to record the testimony of Government investigative agents only for the reason that the reports of these agents, which are at all times available to the United States Attorney, normally contain the substance of their testimony before the Grand Jury. Moreover, substantial portions of these reports are available to the defendant under the Jenks Act should the Government agent testify.

See, also, footnote 5 to the First Circuit's opinion below (Appendix A, p. 9a, to petitioner's petition) in which the First Circuit noted the above statement of the United States Attorney "for what little it is worth," and then observed that "the government disclaimed at the trial having any such report from Murphy."

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID M. SCHEFFER
Counsel for Petitioner
80 Federal Street
Boston, Massachusetts 02110

BENJAMIN ARAC
JEROME GOTKIN
STEPHEN M. HONIG
Of Counsel
September, 1967